

1988

State of Utah v. Thomas R. Humphries : Brief of Respondent

Utah Court of Appeals

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COURT OF APPEALS
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DOCKET NO. 880704 IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff/Respondent, : Case No. 880704-CA
v. :
THOMAS R. HUMPHRIES, : Priority No. 2
Defendant/Appellant. :

BRIEF OF RESPONDENT
- - - - -

APPEAL FROM A CONVICTION OF ISSUING BAD
CHECKS, A THIRD DEGREE FELONY, IN VIOLATION
OF UTAH CODE ANN. § 76-6-505(1) (SUPP. 1988)
IN THE SECOND JUDICIAL DISTRICT COURT, IN AND
FOR DAVIS COUNTY, STATE OF UTAH, THE
HONORABLE DOUGLAS L. CORNABY, JUDGE,
PRESIDING.

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BRIEF OF RESPONDENT

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JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction of Issuing Bad Checks, a third degree felony, in violation of Utah Code Ann. § 76-6-505(1) (Supp. 1988). This Court has jurisdiction to hear this appeal under Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1989).

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Whether defendant failed to preserve issues now raised on appeal?
2. Whether the trial court properly denied defendant's Motion to Continue Trial due to Conflict of Counsel?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah R. Evid. 103(a)(1):

(a) **Effect of erroneous ruling.** Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) **Objection.** In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context;

STATEMENT OF THE CASE

Defendant, Thomas R. Humphries, was charged with Issuing Bad Checks, a third degree felony, in violation of Utah Code Ann. § 76-6-505(1) (Supp. 1988) (R. 13-14). Defendant was convicted as charged after a jury trial held November 4, 1988, in the Second Judicial District Court, in and for Davis County, State of Utah, the Honorable Douglas L. Cornaby, presiding (R. 57). Defendant was sentenced by Judge Cornaby to a term of not more than five years in the Utah State Prison, fined \$5,000 and ordered to pay restitution in the amount of \$1,826.15. Id.

STATEMENT OF FACTS

On May 5, 1988, defendant opened a checking account at the Washington Drive-up Branch of First Security Bank in Ogden, Utah (R. 79, 159-60). Defendant deposited \$100.00 into the new checking account, the only deposit ever made by defendant (R. 79-81). Subsequently, defendant issued the following checks which were not honored by the bank:

<u>DATE WRITTEN</u>	<u>PAYEE</u>	<u>AMOUNT</u>
May 26, 1988	Bowman's Market	\$ 90.00
May 27, 1988	Bowman's Market	\$ 90.00
May 30, 1988	K-Mart	\$273.36
May 30, 1988	Bowman's Market	\$ 70.00
June 5, 1988	Ernst	\$ 93.19
June 5, 1988	Ernst	\$ 70.93

(See Exhibits 1-6, 8) (R. 29). Additionally, numerous other checks totalling \$1,221.62 were issued and returned for insufficient funds. (See Exhibits 9, 11, 12, 13, 14, 16, 17, 18, 21, 23, 24, 25, 26, 27, and 28) (R. 29; T. 88-98).¹ At the time of trial, defendant had not attempted to pay for the dishonored checks (R. 98).

¹ "T." refers to the trial transcript dated November 4, 1988.

At trial, defendant testified that he did not knowingly issue the bad checks. He explained that sometime between May 5 and 15, 1988, he had given a friend, Dorie Stewart, the sum of \$3,600 in cash along with a deposit slip to be deposited in his checking account (T. 174-77, 182). He claimed that unbeknownst to him, Stewart did not deposit the cash but applied it to a debt owing to her by defendant.

Defendant claimed that the \$3,600 in cash was a settlement from a fire insurance claim which was split between he and two business partners (T. 180-81). However, he offered no evidence to corroborate his testimony that he had received a \$3,600 settlement. Finally, he stated that he did not report the \$3,600 taken by Stewart to the police because he owed her some money (T. 190).

SUMMARY OF ARGUMENT

In the trial court, defendant failed to raise the issues that the prosecutor improperly expressed his opinion in closing argument. He failed to raise any claim that the prosecutor threatened a defense witness to not testify. He also failed to raise the claim that the prosecutor improperly inquired of defendant why he offered no corroborating testimony or evidence. Defendant further failed to timely and specifically object to the admission of other bad checks not charged in the information and to the relevancy of bank records of any other checks not charged in the information. By failing to raise specific issues and failing to properly object to others, defendant has failed to preserve any of these four issues for appeal.

Defendant claims that his appointed counsel at the time of the preliminary hearing, Glen Cella, had an admitted conflict of interest. At the preliminary hearing, defendant expressly waived any conflict between he and Cella. Defendant further failed to raise a conflict of interest claim at trial. Finally, where a jury found defendant guilty beyond a reasonable doubt in the trial court, any alleged conflict at the preliminary hearing stage is rendered harmless.

ARGUMENT

POINT I

DEFENDANT FAILED TO PRESERVE FOUR OF THE FIVE
ISSUES RAISED ON APPEAL.

On appeal, defendant raises five issues upon which he claims error: (1) the prosecutor expressed his personal opinion in closing argument that defendant was a "dishonest man"; (2) the prosecutor threatened a defense witness to not testify; (3) the prosecutor commented on defendant's failure to corroborate his story; (4) the trial court admitted evidence of other bad checks not charged in the information; and (5) defendant's counsel at preliminary hearing had a conflict of interest. The first four issues were not raised in the trial court below and should not be considered on appeal.

It is well established that this Court will not consider an issue on appeal which was not raised in the trial court and preserved for appeal. Floyd v. Western Surgical Associates, Inc., 773 P.2d 401 (Utah App. 1989); State v. Steggell, 660 P.2d 252 (Utah 1983). Neither can a defendant attack on appeal the admissibility of evidence where he failed to

make a timely and specific objection to the evidence in the trial court below. Utah R. of Evid. 103(a)(1); State v. McCardell, 652 P.2d 942 (Utah 1982) (contemporaneous objection rule applied).

Regarding defendant's first claim on appeal, defendant failed to raise in the trial court below that the prosecutor improperly expressed his opinion in closing argument (T. 211). As a result, defendant failed to afford the trial court an opportunity to cure any perceivable harm arising from the prosecutor's comment. See State v. Marcum, 750 P.2d 599 (Utah 1988). Accordingly, this Court should not consider defendant's claim.

Defendant further failed to raise any claim in the trial court that the prosecutor threatened a defense witness to not testify (T. 168-71). Without objection, the prosecutor simply informed the defense witness on voir dire that she had a right against compulsory self-incrimination. Id. She invoked her fifth amendment right and defendant proceeded with his defense without raising the present claim. Defendant should not be permitted to raise a claim for the first time on appeal.

Likewise, defendant's claim that the prosecutor improperly inquired of defendant why he offered no corroborating testimony or evidence is now raised for the first time on appeal (T. 182). Defendant must be required to afford the trial court an opportunity to admonish the jury to alleviate any perceived prejudice.

Finally, defendant failed to timely and specifically object to the admission of other bad checks not charged in the

information. Defendant did object to the relevancy of bank records concerning other checks not charged in the information (T. 79). However, Judge Cornaby overruled the objection as premature since no such evidence had been offered as yet by the prosecution (T. 80). At the court's suggestion, defendant agreed to renew his objection in the event that irrelevant checks were offered (R. 80). Defendant made no further objections to the bank record evidence. Thus, defendant failed to preserve the issue for appeal.

In light of the clear absence of preservation of the first four issues on appeal, this Court should not consider the merits of defendant's defective claims.

POINT II

DEFENDANT WAIVED ANY CLAIM OF CONFLICT OF COUNSEL AT THE PRELIMINARY HEARING.

Defendant's last claim is that it was prejudicial error for the Circuit Court Judge to allow defendant's counsel to represent defendant when counsel had an admitted conflict of interest. Defendant's claim must be summarily rejected.

At the preliminary hearing, defendant's appointed attorney, Glen Cella, disclosed that he was also a prosecutor for the City of Kaysville (T. 45). Because the investigating officer was from the Kaysville City Police Department, it was determined that a conflict of interest existed (T. 45; R. 2). However, defendant expressly waived any conflict of interest at the preliminary hearing stage (R. 2).

At trial, defendant's newly appointed attorney, Terry Cathcart, moved the court to continue the trial for a conflict of

counsel (T. 45). The basis of the motion was defendant's belief that Cella's conflict carried over to Cathcart due to the fact that they both received payment for representation from the same source. Id. Judge Cornaby denied the motion finding that no conflict existed between defendant and Cathcart (T. 47).

Defendant's claim on appeal must be rejected for three reasons. First, defendant expressly waived any conflict between he and Cella at the preliminary hearing (R. 2). Second, defendant did not raise a conflict of interest claim at trial between he and Cella. Instead, he raised a conflict between he and Cathcart (R. 45-48). On appeal, he merely raises a conflict claim between he and Cella, but not between he and Cathcart. In light of the fact that he expressly waived such a claim at the preliminary hearing and did not raise it in the trial court, this Court should find that defendant cannot raise the claim on appeal.

Finally, where a jury found defendant guilty beyond a reasonable doubt in the trial court, any alleged conflict of counsel at the preliminary hearing stage is rendered harmless. Cf. Pope v. Turner, 30 Utah 2d 286, 517 P.2d 536, 538 (1973); State v. Gustaldi, 41 Utah 63, 123 P. 897 (1912).

CONCLUSION

Based upon the foregoing, respondent requests this Court to affirm defendant's conviction.

RESPECTFULLY submitted this 21st day of August, 1989.

R. PAUL VAN DAM
Attorney General



DAN R. LARSEN
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Respondent were mailed, postage prepaid, to Steven C. Vanderlinden, attorney for appellant, 1133 North Main, Suite 200, Layton, Utah 84041, this 21st day of August, 1989.

